

These are the tentative rulings for civil law and motion matters set for Tuesday, Nov. 23, 2010, at 8:30 am in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument is given to all parties and the court by 4:00 pm today, Monday, Nov. 22, 2010. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense. Pursuant to Local Rule 20.2.3(A), oral argument shall not exceed 5 minutes per side.

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**EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MARGARET WELLS AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.**

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**1. M-CV-0044571 American Express Centurion Bank vs. Stone, John, et al**

Appearance required for hearing. Plaintiff's attorney may appear by telephone. The court will contact counsel when the matter is called for hearing.

Plaintiff's unopposed motion for summary judgment is granted. Plaintiff is entitled to judgment in the amount of \$22,458.03, plus costs and attorneys' fees pursuant to cost memo and motion for fees.

**2. M-CV-0044613 Wells Fargo Bank, N.A. vs. Grauel, James M.**

Plaintiff's motion to deem requests for admission admitted is denied without prejudice. Defendant has not yet appeared in this action. Because defendant has no address of record, due process requires that the discovery and motion be served in the same manner as summons and complaint.

**3. M-CV-0048309 HSBC Mortgage Services, Inc. vs. Diaz, Friz J.**

Defendant's motion to quash service of summons is denied. No declaration from Defendant was filed stating facts which contradict the facially valid proof of service.

**4. S-CV-0021397 David Gordon, et al vs. Ares Capital Group, Inc., et al**

The motion of defendants Valliance Strategic Properties and Valliance Properties to correct the record or to set aside the default is denied.

First, Valliance Properties was not defaulted and therefore has no standing to bring this motion. Secondly, Valliance Strategic Properties has not shown any mistake,

inadvertence, surprise or excusable neglect, and therefore there is no basis on which to set aside the default. On the court's own motion, the cross-complaint of Valliance Strategic Properties filed on July 14, 2010, is stricken.

The anti-SLAPP motion to strike the cross-complaint of Valliance Capital Group and Valliance Strategic Properties is dropped as moot.

The notice of motion indicates that the motion is directed to the cross complaint filed July 14, 2010, which contains a sole cause of action for abuse of process. That cross-complaint was filed solely by Valliance Strategic Properties, not by Valliance Capital Group. Because that cross-complaint has already been stricken as indicated above, the anti-SLAPP motion to strike is moot.

The motion of Valliance Properties to strike plaintiff's amended complaint is denied.

The motion is directed to the entire amended complaint, rather than to any specific portions of it. As is the case with demurrers, a motion to strike an entire complaint will be denied if any part of the complaint is valid. In this case, plaintiffs have alleged a cause of action based on B & P Code 17200 et seq. which moving party has not challenged. Furthermore, although moving party argues that punitive damages are not proper in this case, it does not separately move to strike punitive damages but only the entire amended complaint. Moving party's argument regarding punitive damages is therefore of no consequence. Finally, the request for judicial notice is denied. There is no basis for judicial notice of such a document in Evidence Code 451 or 452. Moreover, it attempts to introduce and argue evidentiary matter that is not proper on a motion to strike.

## **5. S-CV-0021807    Shelton, Trevor vs. GMAC LLC**

This tentative ruling is issued by Judge Charles D. Wachob. If oral argument is requested, such argument shall be heard on Nov. 23, 2010, at 8:30am in Dept 42.

The unopposed application for preliminary approval of class action settlement is granted. It appears to the court that the proposed settlement falls "within a range of possible approval." (*Alianz v. California Processors, Inc.* (N.D. Cal. 1976) 73 F.R.D. 269, 273.)

The court approves the proposed form of class notice provided that it is revised (at p. 2 of exhibit "A" to the Application, under "The Proposed Settlement") substantially as follows to more clearly advise class members that any obligations they might individually have to GMAC have been extinguished, e.g., **"The purpose of this letter is to inform you that *your* above-referenced account is settled in full and that *you have* no further obligation to make payments on this account."**

Counsel shall submit proposed procedures and deadlines for class members' objections by November 30, 2010. The court will thereafter issue an order establishing the procedures and deadlines for class members' objections and set a final hearing date.

**6. S-CV-0022239 Umpqua Bank vs. Diamond Creek Partners, LTD., et al**

Cross-defendant MacKay's demurrer to the 3d amended cross-complaint was dropped.

**7. S-CV-0022345 CMS Capital Group, Inc. vs. Washington, Adrena, et al**

The motion of Ragghianti Freitas, LLP, to withdraw as attorney of record for plaintiff is granted. Withdrawal will be effective upon service of the signed order after hearing on the client and opposing parties.

The order to be submitted by withdrawing counsel shall include all addresses for plaintiff as shown in the exhibits to counsel's motion.

This matter is set for a **case management conference** on **December 21, 2010**, at 10:00 am in Department 40. Withdrawing counsel shall give notice of the CMC to all parties, including plaintiff, and provide proof of service to the court.

**8. S-CV-0022779 Tavern Inn Condominiums HO Assoc. vs. Tavern Inn II, et al**

Defendant ASRRG's demurrer and motion to strike are continued on the court's own motion to Feb. 1, 2011. The court apologizes for any inconvenience to the parties.

**9. S-CV-0022837 Williams, Tinamarie vs. Dahlgren, Wayne**

This tentative ruling is issued by Judge Charles D. Wachob. If oral argument is requested, such argument shall be heard on Nov. 23, 2010, at 8:30am in Dept 42.

Plaintiff's motion to tax costs is denied as moot. The parties' moving, opposition and reply papers show that defendant has agreed to withdraw its request for the costs it included in the category of its cost memorandum marked "other," and plaintiff has now agreed to pay the balance of the costs which defendant claims.

**10. S-CV-0023933 Wells Fargo Bank, N.A. vs. Kobra Properties et al**

Plaintiff's motion for summary judgment is continued on the court's own motion to Jan. 4, 2011. The court apologizes for any inconvenience to the parties.

**11. S-CV-0024231 North Tahoe Public Utility District vs. The Gar Wood Bldg.**

Plaintiff's demurrer to the 1st amended cross-complaint is continued on the court's own motion to Dec. 21, 2010, to be heard with Cross-defendant Bechdolt's demurrer.

**12. S-CV-0024599 Alexander, Geraldine A. et al vs. Pulte Home Corp. et al**

Motion for leave to file complaint in intervention is dropped. No moving papers were filed.

**13. S-CV-0024717 Ahheong, Richard A. et al vs. Lennar Renaissance Inc.**

Appearance required at 8:30am in Dept 42 on the objections to special master.

**14. S-CV-0025338 First Bank vs. Thomas Holdings, LLC**

Motion to approve receiver's report was continued to Dec. 16, 2010.

**15. S-CV-0025555 Simpson, Michael vs. Westfield Development, Inc.**

Defendant Westfield Development's motion for summary judgment is granted. The undisputed facts are that Plaintiff was employed by a subcontractor (Davison) hired by Defendant. Thus, under the *Privette-Toland* line of cases, in order for Defendant to be found liable for Plaintiff's injuries under a general negligence theory, Plaintiff must establish that Defendant retained control over the safety conditions of the work site *and* that Defendant's exercise of that retained control affirmatively contributed to Plaintiff's injuries. Hooker v. Dept of Transportation (2002) 27 C4th 198, 211-214. However, while Defendant had control over the entire project, it had delegated control over the safety of Davison's employees, including Plaintiff, to Davison. UMF 9-17. A general contractor has the right to delegate the duty to provide a safe work environment to an independent subcontractor. Tverberg v. Fillner Construction (2010) 49 C4th 518, 526-528. While there is evidence that Defendant had its own safety program and safety representative, held monthly safety meetings, and had the ability to speak to subcontractors on site to identify safety hazards and to correct them (UMF 75-78, 86), this is not proof that Defendant retained plenary control over safety conditions at the project site. Kinney v. CSB Construction, Inc (2001) 87 CA4th 28.

Even assuming that Defendant retained plenary control over the safety conditions, Plaintiff has failed to submit any evidence that Defendant's retained control affirmatively contributed to Plaintiff's injury. Hooker v. Dept of Transportation (2002) 27 C4th 198, 211-214. Affirmative contribution is defined to mean where the hirer (general contractor) is "actively involved in, or asserts control over, the manner of performance of the contracted work." Padilla v. Pomona College (2008) 166 CA4th 661, 672, fn 3; Hooker, supra, at 215. Plaintiff has submitted no evidence that Defendant was actively involved in, or asserted control over, the manner of Plaintiff's employer's work on the project. Specifically, Plaintiff presents no evidence that Defendant 1) directed Plaintiff to move the bent plate at the time of the incident; 2) directed Plaintiff on how to move/carry the bent plate at the time of the incident; or 3) supervised Plaintiff in any way at the time of the incident. The case relied on by Plaintiff on this issue (Holman v. State of CA (1975) 53 CA3d 317) was overruled by the California Supreme Court in Camargo v. Tjaarda (2001) 25 C4th 1235. While affirmative contribution can also be established by showing that the general contractor's omission contributed to the injury, there is no evidence that Defendant was aware of any hazardous condition at the accident site, had promised to correct the condition, and negligently failed to do so. Hooker, supra, at 212, n.3.

Plaintiff's arguments regarding the applicability of Labor Code §6400 and Cal/OSHA regulations do not change the above analysis. Cal/OSHA regulations do nothing to

expand the general common law duty of care and violation of a Cal/OSHA regulation is not admissible unless it is shown that the general contractor affirmatively contributed to the injury. Millard v. Biosources, Inc (2007) 156 CA4th 1338, 1349-1352. Further, a violation of Cal/OSHA regulations cannot be used to show that a hirer's conduct affirmatively contributed to the injury unless the regulation creates a nondelegable duty. Padilla, supra, at 674 ("Because there is no nondelegable duty, plaintiff must show conduct other than an asserted failure to comply with the regulation.") The regulation upon which Plaintiff relies (8 CCR §1710) does not create a nondelegable duty.

In order to prevail on the premises liability cause of action against Defendant, Plaintiff must show that Defendant concealed a known hazardous condition from Plaintiff's employer. Kinsman v. Unocal Corp (2005) 37 C4th 659, 674-675. Plaintiff has also to submit evidence establishing a triable issue of fact on this issue. Plaintiff contends that he tripped because the ground was rutty, uneven and sloped. UMF 29. Thus, Plaintiff's own testimony establishes that his accident was caused by an open and obvious condition.

Intervenor Seabright Insurance Company's opposition likewise did not establish any triable issue of fact with respect to the above issues.

The court notes that Plaintiff's response to Defendant's separate statement contained many improper arguments regarding the interpretation of the facts submitted by Defendant. The court has disregarded such improper arguments. Additionally, Plaintiff purported to object to many of the facts contained in Defendant's separate statement. However, it is improper to object to the facts; objections may only be made to evidence. Plaintiff failed to properly object to the evidence supporting those facts as required CRC 3.1354. Thus, Plaintiff's purported objections were also disregarded.

Plaintiff's request for judicial notice of 8 CCR §1710 is granted.

Defendant's request for judicial notice of Plaintiff's first amended complaint is granted.

Defendant's objections to the Adrian declaration submitted by Intervenor Seabright are sustained. Defendant's objections to the Cervantes declaration submitted by Plaintiff are sustained. Defendant's objection to the Bell declaration submitted by Plaintiff regarding the Orcutt deposition transcript is sustained; the remaining objections to the Bell declaration are overruled.

If oral argument is requested, Plaintiff and Intervenor's attorneys' requests for telephonic appearance are granted. The court will contact counsel when the matter is called for hearing.

#### **16. S-CV-0025680    Hawkins, Philip E., et al vs. Brown, Robert A., et al**

This tentative ruling is issued by the Hon. Colleen M. Nichols. If oral argument is requested, it shall be heard November 23, 2010, **8:00 a.m.**, in Department 32.

Plaintiff's motions to compel further responses to discovery from defendant Robert Brown and all future discovery disputes are hereby referred to a discovery referee per C.C.P. § 639(a)(5). If the parties agree to a referee, the court will appoint that person. If the parties cannot agree, each party shall submit, by December 10, 2010, the names of 3 proposed referees, with information regarding their hourly rates. The court will then

choose from among the names.

The parties shall comply with California Rule of Court 2.400(b) with respect to any matters submitted to the referee.

Plaintiff's motion for leave to file a third amended complaint is granted. The third amended complaint shall be filed and served no later than December 7, 2010.

**17. S-CV-0025681 Wells Fargo Bank, N.A. vs. Step Golf Associates, LLC, et al**

Motion to strike portions of 1st amended complaint in intervention and motion for leave to deposit funds are continued on the court's own motion to Jan 18, 2011. The court apologizes for any inconvenience to the parties.

**18. S-CV-0025824 Menefee, Theresa vs. Mercedes-Benz USA, LLC, et al**

Wells Fargo's motions to compel further responses to interrogatories and request for admissions are dropped. The motions shall be heard by the discovery referee.

**19. S-CV-0025937 Campagna, Victor T. vs. Beazer Homes, Inc**

This tentative ruling is issued by the Hon. Charles D. Wachob. If oral argument is requested, it shall be heard November 23, 2010, 8:30 a.m., in Department 42.

Defendant Beazer Homes, Inc.'s, demurrer to the complaint is overruled. The complaint alleges at ¶¶ L-1, GN-1, and BC-2 that injury occurred October 21, 1999, which, taken alone, does not exceed the repose period of C.C.P. § 337.15. Defendant's request for judicial notice is granted in part: the court takes judicial notice of the documents from the City of Rocklin, but does not assume the truth of any matters asserted therein. The Rocklin letter does not identify the nature of the second page. The second page does not clearly state its nature or describe its contents. For example, the owner, job contractor, job address, permit no., date issued, nature of work, and date fields are blank, and the title appears to have been covered. As such, the court cannot rely on information found on that page without construing or interpreting its contents. The demurrer tests only the allegations and other facts subject to judicial notice. Defendant has not shown that the allegations fail to state a claim because of the repose period of C.C.P. § 337.15.

Defendant's objections to plaintiff's evidence are sustained. The court does not consider extraneous evidence when ruling on a demurrer.

Defendant's unopposed motion to strike portions of the complaint is granted with leave to amend.

Any amended complaint shall be filed and served no later than December 7, 2010.

**20. S-CV-0025940 Vos, Selwyn D.J. vs. Gigliotti, Linda et al**

Plaintiff's motion for leave to file first amended complaint is granted. The first amended complaint shall be served and filed by December 1, 2010. The granting of this motion is without prejudice to the filing of a demurrer or other responsive pleadings.

Defendant's request for judicial notice is granted.

If oral argument is requested, Defendants Calhoon and Golden West Real Estates' attorney's request for telephonic appearance is granted. The court will contact counsel at the time the matter is called for hearing.

**21. S-CV-0025972 Daily, James et al vs. Placer County Water Agency**

Defendant PCWA's motion for leave to file cross-complaint is denied without prejudice. There is no proof of service in the court's file of the motion or of the ex parte order setting the matter for hearing.

**22. S-CV-0026349 Amato, Jerry F. vs. Del Webb California Corp.**

The motion of Golden Eagle Insurance Company for leave to intervene is granted. The complaint in intervention shall be served and filed by December 3, 2010.

**23. S-CV-0026353 Citibank South Dakota, N.A. vs. Grandfield, Dannie R.**

Defendant's motion for judgment on the pleadings is denied. The arguments in the motion are based on hypothetical partial denials that are not contained in the answer on file with the court. The motion does not address the claims in defendant's answer.

**24. S-CV-0026843 Johnson, Patricia vs. Placer County, et al**

Defendant City of Auburn's demurrer to the first amended complaint is continued on the court's own motion to Jan. 11, 2011, to be heard by Judge Colleen Nichols.

**25. S-CV-0027001 Alman, Richard T., et al vs. Thompson, Sue**

Defendant Thompson's motion to strike the claim for punitive damages from the first amended complaint is denied. The intentional tort cause of action in the first amended complaint states facts to the effect that defendant intentionally misrepresented that plaintiff's buyer would be assuming plaintiffs' loan. This is sufficient for a claim for punitive damages per CC 3294.

If oral argument is requested on this matter, both parties' attorneys' requests to appear by telephone are granted. The court will contact counsel when the matter is called for hearing.

**26. S-CV-0027081 Cempa, Maria, et al vs. Lime Financial Services, Ltd, et al**

Defendants Lime Financial Services, Saxon Mortgage Services, and HSBC Bank's demurrer to complaint is sustained with leave to amend.

The entire complaint is defective because plaintiff has not alleged tender of the amount due. Abdallah v. United Savings Bank (1996) 43 CA4th 1101.

The 1st and 2d causes of action for intentional and negligent misrepresentation

against Lime and Saxon fail to state claims in that they are not specifically pled. These causes of action do not allege who made the representations and his/her authority to do so. The complaint is apparently based on the theory that the individual defendants (mortgage brokers) were defendants' agents. However, a mortgage broker is agent of the borrower, not the lender. Wyatt v. Union Mortgage Co. (1979) 24 C3d 773.

The 3d cause of action for breach of fiduciary duty against Lime fails to state a claim in that there is no fiduciary relationship between borrower and lender. Kim v. Sumitomo Bank (1993) 17 CA4th 974.

The 4th cause of action for aiding and abetting against Lime fails to state a cause of action in that there are no facts alleged showing that defendants had actual knowledge of the specific primary wrong, or intentional participation. Austin B. v. Escondido Union School Dist. (2007) 149 CA4th 860.

The 6th cause of action for tortious interference with contract against Lime fails to state a cause of action in that, even if defendants acts caused the result complained of, there are no facts alleged to show that defendants intended to cause the result. Kasparian v. County of Los Angeles (1995) 38 CA4th 242.

The 8th cause of action for wrongful foreclosure against Lime, Saxon, and HSBC fails to state a cause of action in that this cause of action is based on the unsupported "original note" theory. Possession of original note is not required in a non-judicial foreclosure.

Defendant Quality Loan Service's demurrer to the 8th cause of action is sustained with leave to amend, in that this cause of action is based on the unsupported "original note" theory. Possession of original note is not required in a non-judicial foreclosure.

Defendants Lime Financial Services, Saxon Mortgage Services, and HSBC Bank's motion to expunge lis pendens is granted. The complaint does not allege any cause of action which would affect title to or possession of real property. Defendants are awarded attorneys' fees in the amount of \$950.

If oral argument is requested on this matter, the request of the attorney for defendants Lime, et al., to appear by telephone is granted. The court will contact the attorney when the matter is called for hearing.

## **27. S-CV-0027151    Cooper, Jay vs. Paulsen, John Howard**

Defendant Paulsen's motion to compel further discovery responses is dropped. No moving papers were filed.

## **28. S-CV-0027273    Scott, Annette Cherie, et al vs. Scott, Janet M.**

Defendant Scott's demurrer is continued on the court's own motion to Feb. 8, 2011, to be heard by Judge Colleen Nichols.



**29. S-CV-0027817 Patriot Settlement Resources, LLC vs. Davis, Patrick**

Petition for approval of transfer of structured settlement payments was continued to Dec. 14, 2010, by Petitioner.

**30. T-CV-0001271 Rufer, Chris and Melodie vs. Cook Sr., Robert C**

Cross-complainant's motion for leave to amend cross-complaint is granted. The court makes no ruling on the applicability of the collateral source rule to the claims in the amended cross-complaint.

**31. T-CV-0001499 Gray, Diana vs. Blount, Patrick R., Michael, & Mary**

Appearance required for hearing at 8:30am in Dept 42 on Defendants' motion for summary judgment.

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